

**NO. 44525-5-II**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

**ROBIN LAVIN,**

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PACIFIC COUNTY

The Honorable Michael J. Sullivan, Judge

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**SUPPLEMENTAL BRIEF OF APPELLANT**

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LISA E. TABBUT  
Attorney for Appellant  
P. O. Box 1396  
Longview, WA 98632  
(360) 425-8155

## TABLE OF CONTENTS

	Page
<b>A. SUPPLEMENTAL ASSIGNMENTS OF ERROR.....</b>	<b>1</b>
1. No facts support the restitution order.....	1
2. Defense counsel’s failure to prepare and present the applicable law on restitution to the trial court denied Mr. Lavin his right to effective counsel.....	1
<b>B. SUPPLEMENTAL ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....</b>	<b>1</b>
1. A jury found Mr. Lavin guilty of trafficking in stolen property in the second degree for selling a stolen hoe pack. Did the trial court subsequently err when it ordered Mr. Lavin to pay \$3,300 in restitution for an unrelated level laser, cut off saw, and generator?.....	1
2. Was Mr. Lavin denied effective assistance of counsel when his attorney failed to argue at the restitution hearing that the law requires a nexus between the crime and any restitution? .....	1
<b>C. SUPPLEMENTAL FACTS .....</b>	<b>1</b>
<b>D. SUPPLEMENTAL ARGUMENT .....</b>	<b>2</b>
1. THE TRIAL COURT ERRED IN IMPOSING RESTITUTION AS THERE IS NO NEXUS BETWEEN THE RESTITUTION AND MR. LAVIN’S CRIME.....	2
2. DEFENSE COUNSEL’S FAILURE TO INFORM THE COURT ON THE APPLICABLE LAW AT THE RESTITUTION HEARING DENIED MR. LAVIN HIS RIGHT TO EFFECTIVE COUNSEL. ....	7
<b>E. CONCLUSION .....</b>	<b>9</b>
<b>CERTIFICATE OF SERVICE .....</b>	<b>10</b>

## TABLE OF AUTHORITIES

	Page
<b>Cases</b>	
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).....	7
<i>McMann v. Richardson</i> , 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970).....	7
<i>State v. Acevedo</i> , 159 Wn. App. 221, 248 P.3d 526 (2010).....	4
<i>State v. Cham</i> , 165 Wn. App. 438, 267 P.3d 528 (2011).....	8
<i>State v. Dauenhauer</i> , 103 Wn. App. 373, 12 P.3d 661 (2000), <i>review denied</i> , 143 Wn.2d 1011 (2011) .....	4, 5
<i>State v. Enstone</i> , 89 Wn. App. 882, 951 P.2d 309 (1998) .....	3
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011) .....	8
<i>State v. Griffith</i> , 164 Wn.2d 960, 195 P.3d 506 (2008) .....	3
<i>State v. Hunotte</i> , 69 Wn. App. 670, 851 P.2d 694 (1993) .....	3
<i>State v. Kylo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009) .....	8
<i>State v. Miszak</i> , 69 Wn. App. 426, 848 P.2d 1329 (1993).....	4
<i>State v. Oakley</i> , 158 Wn. App. 544, 242 P.3d 886 (2010), <i>review denied</i> , 171 Wn.2d 1021 (2011) .....	3, 5
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....	8
<i>State v. Woods</i> , 90 Wn. App. 904, 953 P.2d 834, <i>review denied</i> , 136 Wn.2d 1021 (1998) .....	4

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	7, 8
<i>United States v. Salemo</i> , 61 F.3d 214 (3rd Cir. 1995) .....	8

**Statutes**

RCW 9.94A.753(5).....	3
RCW 9A.82.055.....	2

**Other Authorities**

Article I, Section 22 of the Washington State Constitution.....	7
U.S. Const. Amend. VI .....	7
U.S. Const. Amend. XIV .....	7

**A. SUPPLEMENTAL ASSIGNMENTS OF ERROR**

1. No facts support the restitution order.
2. Defense counsel's failure to prepare and present the applicable law on restitution to the trial court denied Mr. Lavin his right to counsel.

**B. SUPPLEMENTAL ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A jury found Mr. Lavin guilty of trafficking in stolen property in the second degree for selling a stolen hoe pack. Did the trial err when it subsequently ordered Mr. Lavin to pay \$3,300 in restitution for an unrelated level laser, cut off saw, and generator?
2. Was Mr. Lavin denied effective assistance of counsel when his attorney failed to argue at the restitution hearing that the law requires a nexus between the crime and any restitution?

**C. SUPPLEMENTAL FACTS**

By his notice of appeal, Mr. Lavin appealed all portion of his judgment and sentence. CP 17-18. The judgment and sentence set Mr. Lavin's restitution hearing for April 12, 2013. CP 11.

On April 12, the state presented the trial court with a restitution claim on behalf of Rognlin's, Inc. By the claim, the state asked that Mr. Lavin be obliged to pay \$3,300 restitution broken down as

Level laser -- \$1,200.00

Cut off saw -- \$600.00

Generator -- \$1,500.00

Supplemental Designation of Clerk's Papers, Restitution Estimate and Victim Impact (sub. nom. 59), page 2.

A restitution hearing was held the same day. RP Restitution Hearing 2-3. Mr. Lavin was present with his trial counsel. Defense counsel argued only that he could not "really take a position on [the proposed restitution]," Mr. Lavin maintained his innocence, and any restitution ordered should be stayed pending the outcome of the appeal. RP Restitution Hearing 2. The court held it had no reason not to enter the restitution order and obliged Mr. Lavin to pay the full \$3,300 requested. RP Restitution Hearing 3; Supp. DCP, Order of Restitution (sub. nom. 60), page 1.

#### **D. SUPPLEMENTAL ARGUMENT**

##### **1. THE TRIAL COURT ERRED IN IMPOSING RESTITUTION AS THERE IS NO NEXUS BETWEEN THE RESTITUTION AND MR. LAVIN'S CRIME.**

Mr. Lavin was convicted by a jury of trafficking in stolen property in the second degree<sup>1</sup> for selling a hoe pack that had been stolen from Roglin's, a Pacific County construction company. CP 3. The Information

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<sup>1</sup> RCW 9A.82.055

on which Mr. Lavin was tried, accused him of trafficking in one stolen item, a Teledyne hoe pack. CP 4. At the restitution hearing, the trial court did not order Mr. Lavin to pay restitution as it related to the hoe pack. Instead, the court ordered Mr. Lavin to pay \$3,300 for three unrelated items: a level laser, a cut off saw, and a generator. It was error for the trial court to order Mr. Lavin to pay restitution on items that had no nexus with his crime. The restitution order should be reversed.

A trial court's authority to impose restitution is statutory. *State v. Griffith*, 164 Wn.2d 960, 965-966, 195 P.3d 506 (2008). The statutory provision authorizing restitution provides, in relevant part,

Restitution shall be ordered whenever the offender is convicted of an offense which results in injury to any person or damage to or loss of property.

RCW 9.94A.753(5). “[R]estitution is appropriate so long as there is a causal connection between the crime and the injuries for which compensation is sought.” *State v. Enstone*, 89 Wn. App. 882, 886, 951 P.2d 309 (1998). “A causal connection exists when, ‘but for’ the offense committed, the loss or damages would not have occurred.” *State v. Oakley*, 158 Wn. App. 544, 552-553, 242 P.3d 886 (2010), *review denied*, 171 Wn.2d 1021 (2011); *Enstone*, 89 Wn. App. at 886 (quoting *State v. Hunotte*, 69 Wn. App. 670, 676, 851 P.2d 694 (1993)).

For purposes of determining restitution, whether a loss is causally connected to the crime for which the defendant was convicted is a question of law reviewed de novo. *State v. Acevedo*, 159 Wn. App. 221, 229-30, 248 P.3d 526 (2010).

A trial court cannot impose restitution based on a defendant's "general scheme" or acts "connected with" the crime charged, when those acts are not part of the charge. *State v. Woods*, 90 Wn. App. 904, 907-08, 953 P.2d 834, *review denied*, 136 Wn.2d 1021 (1998) (quoting *State v. Miszak*, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993)).

In *Dauenhauer*, Division Three of this court vacated a restitution order for damages resulting from uncharged acts. *State v. Dauenhauer* 103 Wn. App. 373, 379-80, 12 P.3d 66 (2000), *review denied*, 143 Wn.2d 1011 (2001). Dauenhauer burglarized three storage units. He drove through two fences and collided with a truck in an attempt to flee a police officer who observed Dauenhauer at the crime scene. *Id.* at 375. A jury convicted Dauenhauer of second degree burglary, and the trial court ordered him to pay restitution for damage to the fences and the truck. *Id.* at 379. On appeal, the court determined that the trial court had no statutory authority to order restitution for these damages because they resulted from "Dauenhauer's general scheme or acts merely connected with the burglaries." *Id.* at 380.



Similarly, this court reversed a restitution order in *State v. Oakley*, for lack of a causal connection between Oakley's charged crimes – three second degree assaults and an attempted drive-by shooting - and damages to a neighbor's vehicle and garage door. 158 Wn. App. at 553. Oakley inflicted these damages while he fled the scene of the assaults and attempted drive-by. Although Oakley's flight, like the defendant in *Dauenhauer*, were “connected with” his underlying crimes because he was trying to avoid apprehension when he caused the damages, Oakley did not crash into the neighbor's vehicle and garage door as a result of his assaults and attempted drive-by shooting. As such, there was an insufficient causal connection between the charged crimes and the damages. Consequently, the court vacated those portions of the restitution order that applied to the neighbor's car and garage door. *Id.*

As in *Dauenhauer*, 103 Wn. App. 373, and *Oakley*, 158 Wn. App. 544, reversal of the restitution order is also the appropriate remedy in Mr. Lavin's case. Although there was testimony at trial that could be interpreted to mean the Rognlin's hoe pack was stolen at or around the same time as a cut off saw and a laser belonging to Rognlin's, Mr. Lavin was not charged with the theft or being in possession of either of those

items. RP<sup>2</sup> 28; CP 4-5.<sup>3</sup> In closing argument at trial, the prosecutor argued it was unknown if Mr. Lavin stole anything or was present when anything was stolen. RP 104.

As for the generator, the trial record does not support a finding that a generator was stolen from Rognlin's. The only time a generator was associated with Rognlin's at trial was in closing argument when, out of the blue and unrelated to any trial testimony, the prosecutor argued that a Honda generator was stolen from Rognlin's. RP 101. No facts in the record support the prosecutor's argument. (See Opening Brief of Appellant, Issue 2, pages 15-22.)

There is no "but for" connection between Mr. Lavin selling a stolen hoe pack and Rognlin's missing level laser, cut off saw, and generator. The loss to Rognlin's would have occurred even if Mr. Lavin did not sell the hoe pack. Trial court lacked legal authority to impose restitution on those items. The restitution order should be reversed.

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<sup>2</sup> "RP" refers to the single volume of verbatim prepared for this appeal that includes the jury trial.

<sup>3</sup> After putting on all of the state's case, the prosecutor moved to strike the diesel compactor language from the original information. RP 79; CP 1-2. Prior to instructing the jury, the prosecutor moved to file an amended information deleting the diesel compactor language. RP 96. Mr. Lavin did not object to the amendment. RP 96. The prosecutor filed the new information on February 8, 2013. CP 4-5. The new – second information – is captioned "Information" rather than "Amended Information."

**2. DEFENSE COUNSEL’S FAILURE TO INFORM THE COURT ON THE APPLICABLE LAW AT THE RESTITUTION HEARING DENIED MR. LAVIN HIS RIGHT TO EFFECTIVE COUNSEL.**

Defense counsel failed Mr. Lavin by making no effort to present the court with the law explaining the required nexus between a conviction and what the state requested as restitution. Had defense counsel done so, no restitution would have been imposed. As argued in Issue 1, the law does not support restitution imposed in Mr. Lavin’s case.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S. Ct. 92, 9 L. Ed. 2d 799 (1963)). Likewise, Article I, Section 22 of the Washington State Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)). Effective counsel is “one of the most

fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

To demonstrate ineffective assistance of counsel, the defendant must show both (1) that defense counsel’s representation fell below an objective standard of reasonableness and (2) prejudice. *Strickland* 466 U.S. at 694; *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (reaffirming adherence to the *Strickland* test). Prejudice requires a showing that but for counsel’s performance it is reasonably probable that the result would have been different. *State v. Cham*, 165 Wn. App. 438, 267 P.3d 528 (2011); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting *Strickland*, 466 U.S. at 694).

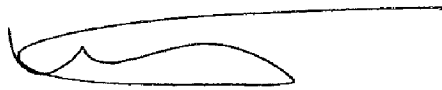
Defense counsel is ineffective when he fails to research and present the applicable law. *State v. Kylo*, 166 Wn.2d 856, 868, 215 P.3d 177, 183 (2009) (defense counsel ineffective when failing to present the court with the correct law on self-defense). Had defense counsel challenged the inapplicable restitution by making a legal argument supported by the law (as argued under Issue I), the trial court would not have imposed restitution.

Mr. Lavin was denied effective counsel at his restitution hearing. The restitution order should be reversed.

**E. CONCLUSION**

The restitution order should be reversed and restitution stricken from Mr. Lavin's judgment and sentence.

Respectfully submitted this 24th day of October 2013.

A handwritten signature in black ink, appearing to read 'LISA E. TABBUT', with a long horizontal line extending to the right.

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LISA E. TABBUT/WSBA 21344  
Attorney for Robin Lavin

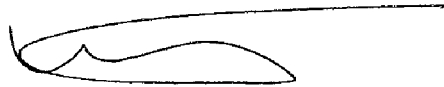
## **CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Supplemental Brief to: (1) David Burke, Pacific County Prosecutor's Office, at [dburke@co.pacific.wa.us](mailto:dburke@co.pacific.wa.us); (2) the Court of Appeals, Division II; and (3) mailed it to Robin Lavin, 5393 Highway 101, South Bend, WA 98586.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed October 24, 2013, in Mazama, Washington.

A handwritten signature in black ink, appearing to be 'Lisa E. Tabbut', with a long horizontal stroke extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Robin Lavin

# COWLITZ COUNTY ASSIGNED COUNSEL

**October 24, 2013 - 4:04 PM**

## Transmittal Letter

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